JD–136–97
Canton, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GREENFIELD DIE AND MANUFACTURING CORPORATION

and

Cases 7–CA–37441
7–CA–37793
7–CA–38265

LOCAL 247, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO AND RENO P. CAMILLERI, an Individual

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for the Charging Party.

SUPPLEMENTAL DECISION

KARL H. BUSCHMANN, Administrative Law Judge. By Order of June 6, 1997, the Board remanded this case to me for (1) an analysis regarding the General Counsel's revocation of the October 1995 settlement agreement and (2) a clarification of Elmer Runyon's lawful discharge and further clarification of Reno Camilleri's unlawful discharge.

Turning initially to the second issue, because it has a bearing on the former, I found in the underlying decision that the discharge of Elmer Runyon presented a dual motive issue. The General Counsel had presented a prima facie case that the Respondent discharged Runyon because he, like Joseph Provo, was a union activist. Runyon's open support of the Union was conceded by the Respondent. Don Hinkle, the Respondent's president, referred in his testimony to Provo and Runyon as the two union supporters who harassed and bothered the other employees to sign union cards. The Respondent had threatened the employees with discharge because of their union activities. Clearly, Provo lost his job because he was the leading union activist. The union activity was also the motivating factor in Runyon's discharge. However, the Respondent had successfully shown that it would have discharged Runyon even in the absence of his union activity. *Wright Line*, 251 NLRB 1083 (1980).

Runyon had a history of absenteeism. He had received two prior written reports, one dated July 27 and the second on September 2, 1995. He had also received two oral warnings and been told that his absenteeism would no longer be tolerated. After he was absent again, because he spent several days in jail, the Respondent terminated his employment. Under

these circumstances, I found that Runyon would have been discharged even in the absence of his union activity.

With respect to Camilleri, the record shows that the Respondent discharged Camilleri in an effort to show consistency with Runyon's discharge and to conceal any antiunion animus. Unlike Runyon, Camilleri was not a union supporter, but like Runyon, Camilleri was absent from work because of time spent in jail. Camilleri had no prior history of absenteeism and until the time of Runyon's discharge on September 28, 1995, Camilleri had an understanding with the Company's president, Don Hinkle, that he would still have a job after his 19 days of confinement. Don Hinkle had assured him in advance that everything would be worked out. In early October, Camilleri made a written request for special leave of absence. On October 30, 1995, when Camilleri reported for work,[1] Supervisor Pykor welcomed him upon his return. However, in a sudden turn of events, Donna Sanderson, human resource administrator, handed Camilleri a termination notice for absenteeism. As explained in the underlying decision, I did not credit the testimony of Don Hinkle generally, and, in particular his testimony that he, the owner and president of the Company, lacked the authority to grant a leave of absence to an employee. I also discredited the testimony of Sanderson, especially the statements, that she had the sole and exclusive authority over personnel decisions and was in charge of the Company's labor policy but that she was totally unaware of the employees' organizational drive or the pendency of the unfair labor practice charges, when she discharged Camilleri. The testimony of Supervisor Henry Pykor was totally unreliable. His responses indicated that he knew little or nothing about the union activity or the employees' involvement with the Union. I credited Camilleri's testimony and his recollection that Hinkle had made a commitment with him that he would keep his job.

The record shows why the Respondent did not keep its promise. In a conversation with Pykor on the day Camilleri reported for work, Pykor said: "We got a little snag here. We got to discuss this over with our attorneys and we have a meeting about you, because of what happened with Harold" (Tr. 183). Camilleri also spoke to Hinkle pleading for his job. Hinkle told him to go home and wait for a decision. On the following day, Camilleri called Hinkle who told him that the discharge was final but that Camilleri could reapply "after this thing deal blows over" (Tr. 190). I accordingly concluded that the sudden turnabout in the Respondent's attitude was its attempt to appear consistent with the treatment accorded Runyon when he was discharged a month earlier for excessive absenteeism following several days in jail.

The fact that an employee is not a union member and had not engaged in any union activity does not per se immunize an employer's adverse treatment of that employee from answerability under the Act. *Dayton Hudson Department Store*, 324 NLRB No. 1 (July 25, 1997). Significantly, the Board has held that the discharge of a nonunion employee to cover up the discharge of an unwanted employee violates the Act. *Jack August Enterprises,* 232 NLRB 881, 900 (1977), enfd. 583 F.2d 575 (1st Cir. 1978).

The mere fact that the Respondent has proved affirmatively that he would have disciplined Runyon notwithstanding the Respondent's antiunion animus under *Wright Line*, supra*,* does not vitiate or void the Respondent's antiunion animus, nor should it avoid a finding that the Respondent intended to conceal its actions against Runyon by also discharging

[1] Camilleri testified that he returned on October 31, but the termination report was dated October 30, 1995.

Camilleri.[2] Camilleri had no prior history of absenteeism, nor was there any hint that his job was in jeopardy until the day of his return on October 30. To the contrary, Camilleri had Hinkle's assurance and did everything to keep his job. The Respondent's change in attitude was a clear attempt to treat Camilleri and Runyon equally after each spent several days in jail.

Turning to the first area of concern in the Board's remand Order, I found that the General Counsel properly set aside the settlement agreement of October 23, 1995, and that the Respondent's objections to the Order of January 25, 1996, should be overruled. The Respondent's argument that it complied with the terms of the agreement and that any litigation involving presettlement conduct, including the discharges of Provo and Runyon, is barred, ignores the General Counsel's arguments that the Respondent's compliance with the settlement can only be determined after a hearing on the matter and that the settlement did not encompass the 8(a)(3) and (1) allegations. The General Counsel argued at the hearing that the Respondent had violated the terms of the settlement and that the agreement expressly authorized findings of violations in other cases. The record shows that the settlement was executed on October 23, 1995. Clearly, the discharge of Camilleri in violation of Section 8(a)(1) and (3) of the Act occurred subsequently, namely on October 30, 1995.

Moreover, the agreement solely covered the independent 8(a)(1) allegations as contained in the charges filed by the Union on July 17, 1995, as amended on August 30, 1995, in Case 7–CA–37441. The resulting complaint issued on September 8, 1995. The charges involving the discharges of employees Provo and Runyon in Case 7–CA–37793 were filed subsequently, namely on October 18, 1995, and amended on January 19 and 22, 1996. On January 25, 1996, the Regional Director issued an order setting aside the settlement in Case 7–CA–37441 containing the 8(a)(1) allegations, charging that the Respondent had violated the terms of the agreement in that case. He simultaneously issued an order consolidating that case with the complaint in Case 7–CA–37793 containing the 8(a)(3) and (1) allegations dealing with the discharges of Provo and Runyon. The original charges in the second case preceded the settlement date of the first case by 5 days, but the charges were amended subsequent to the October 23 date.

"The Board has long held that a 'settlement agreement may be set aside and unfair labor practices found based on presettlement conduct if there has been a failure to comply with the provisions of the settlement agreement or if postsettlement unfair labor practices are committed.'" *Twin City Concrete*, 317 NLRB 1313 (1995). In the instance case, it is clear that the settlement was properly set aside for both reasons, the Respondent violated the terms of the agreement and it committed unfair labor practices after the settlement. Camilleri's discharge occurred after the settlement and the Respondent violated settlement agreement by the discharges of employees in violation of Section 8(a)(1) of the Act, in spite of its promise in the agreement not to interfere with the employees' Section 7 rights.

Although a settlement agreement ordinarily disposes of all presettlement conduct known to the General Counsel, the settlement agreement provides, inter alia:

> SCOPE OF THE AGREEMENT — This Agreement settles only the allegations in the above-captioned case(s), and does not constitute a settlement of any other case(s) or matters. It does not preclude persons from filing charges, the General Counsel from prosecuting complaints, or the Board and the courts from finding

[2] The reference to "pretextual" discharge in the underlying decision is concededly confusing.

> violations with respect to matters which precede the date of the approval of this Agreement, regardless of whether such matters are known to the General Counsel or are readily discoverable. The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned case(s) for any relevant purpose in the litigation of this or any other case(s), and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to said evidence.

The parties thereby agreed to reserve from the settlement certain issues. The 8(a)(1) settlement, basically involving verbal misconduct, clearly did not encompass the 8(a)(3) allegations contained in the second case, where the Respondent retaliated against the employees. *Ratliff Trucking Corp*., 310 NLRB 1224 (1993).

I accordingly found that the General Counsel's order was appropriate in all respects.

Dated, Washington, D.C. August 18, 1997

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Karl H. Buschmann
Administrative Law Judge